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No. 06-173

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

SAN CARLOS APACHE TRIBE,

Petitioner,

v.

STATE OF ARIZONA; GILA RIVER INDIAN COMMUNITY; ASARCO LLC; PHELPS DODGE INCORPORATED; SAN CARLOS IRRIGATION AND DRAINAGE DISTRICT; CITY OF SAFFORD; GILA VALLEY IRRIGATION DISTRICT; FRANKLIN IRRIGATION DISTRICT; SALT RIVER PROJECT; CITY OF GOODYEAR; BHP COPPER INCORPORATED, AND UNITED STATES OF AMERICA,

Respondents.

On Petition For Writ Of Certiorari To The Arizona Supreme Court

BRIEF IN OPPOSITION OF RESPONDENT ASARCO LLC

LAUREN J. CASTER
Counsel of Record
MICHAEL J. PEARCE
FENNEMORE CRAIG, P.C.
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913
(602) 916-5367

Attorneys for Respondent ASARCO LLC

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether the Arizona Supreme Court erred in declining to consider the San Carlos Apache Tribe's state court challenge to the binding nature of a consent decree entered by the United States District Court for the District of Arizona, when the Tribe failed to argue before that District Court that the decree does not bind it.

CORPORATE DISCLOSURE STATEMENT

ASARCO LLC, a Delaware limited liability company, is wholly owned by Asarco Incorporated, a Delaware corporation. Asarco Incorporated is wholly owned by Americas Mining Corporation, a Delaware corporation. Americas Mining Corporation is wholly owned by Grupo Mexico, S.A. de C.V. Grupo Mexico, S.A. de C.V. is traded on the Mexican Stock Exchange. No stock of the other entities mentioned is publicly traded.

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STATEMENT OF THE CASE

ASARCO LLC ("ASARCO") incorporates by reference the statement of facts in part I of the primary opinion below. *In re General Adjudication of All Rights to Use Water in Gila River System & Source*, 212 Ariz. 64, --, 127 P.3d 882, 885-87 (2006), *reconsideration denied*, 212 Ariz. 470, 134 P.3d 375 (2006); Petitioner's App. A at 2a-8a. Much of the discussion and many of the contentions contained in the Petition are incorrect and irrelevant to the issues it poses. ASARCO responds below to the Petition's misstatements that may be material to the questions presented.

It is important to understand at the outset, however, what the Arizona Supreme Court did and did not do, to the extent relevant to the issues raised in the Petition. The Court ruled that as a matter of comity it would not entertain an attack by the San Carlos Apache Tribe (the "Tribe") on the federal court's Globe Equity Decree (the "Decree") founded on the alleged absence of privity between the Tribe and its Trustee. *See id.* at --, 127 P.3d at 901; Petitioner's App. A at 46a-47a. The decision below is supported, indeed dictated, by precedent of this Court and lower federal courts. The fact that the Tribe lacks another avenue for relief is solely the result of its own conscious, express decision in 1990 not to invoke the originating District Court's jurisdiction in mounting such a challenge to the Decree. *See id.* at --, 127 P.3d at 900; Petitioner's App. A at 44a; *infra* at 14, 20. The Arizona Supreme Court was manifestly correct in refusing to effectuate the Tribe's ploy to litigate its privity defense in a venue other than the District Court that entered the Decree.

ASARCO's corrections of significant misstatements found in the Petition follow.

A. The Globe Equity Court Already Ruled That The Decree Precludes The San Carlos Apache Tribe From Claiming An Additional Right To The Mainstem Of The Gila River.

The Tribe represents that "the *Globe Equity* court has never ruled as to the preclusive effect of the *Globe Equity Decree* as to the Apache Tribe or as to GRIC." Petition at 11 n.19. This is incorrect. Shortly after intervening in the Globe Equity litigation, the Tribe attempted unsuccessfully to expand its rights under the Decree by securing an entitlement to continuous flow in the Gila River. In *United States v. Gila Valley Irrig. Dist.*, 804 F. Supp. 1, 10 (D. Ariz. 1992), *aff'd in part and rev'd in part on other grounds*, 31 F.3d 1428 (9th Cir. 1994), the District Court held:

> To the extent that the Tribe argues that a live stream condition is mandated under the doctrine of beneficial use, the Court must disagree. While Article XI limits diversions from the river to those which are of beneficial use, Article XII [sic; should be Article XIII] specifically enjoins parties with decreed water rights from "asserting or claiming . . . any right, title, or interest in or to the waters of the Gila River. . . . " The Court agrees with UVDs that the Decree was intended as a complete statement of the rights of the various parties to the waters of the Gila River. The Court agrees with the Tribe that the drafters lacked both foresight and concerns for the interests of the Apaches living on and near the river. However, the Court is

> constrained by the Decree to conclude that, for purposes of uses not specified in the Decree, the Tribe can assert no right to a live stream condition.

This is an unmistakable ruling that the Decree precludes the Tribe from claiming water rights in the mainstem of the Gila River not recognized in the Decree.

B. The District Court, In A Separate Action Initiated By The Tribe, Refused To Compel Operation Of The San Carlos Reservoir In A Manner Different From That Required By The Decree.

The decision in *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 867 (D. Ariz. 2003), *aff'd in part*, 417 F.3d 1091 (9th Cir. 2005), *and aff'd in part*, 144 Fed. Appx. 635 (9th Cir. 2005) (unpublished), also bears on the Tribe's prior efforts to escape the effect of the Decree. The Tribe filed an independent action in the District Court for the District of Arizona challenging drawdowns of the San Carlos Reservoir pursuant to the Decree. It effectively sought a right to retain water in the San Carlos Reservoir for its own purposes. The District Court described the claim as follows:

> [T]he Plaintiffs allege that there has been a material change in circumstances that justifies modification of the comprehensive management provisions for operating the Reservoir that are set out in the Gila River Decree [also known as the Globe Equity Decree]. . . .

Id. The District Court denied all relief. 272 F. Supp. 2d at 868. In doing so it made several observations that undercut the Petition:

> The challenged drawdowns merely reflect the rights and obligations of the respective parties to the waters in the Reservoir, as established by the San Carlos Project Act, the Globe Equity Agreement, and the San Carlos Apache Tribe Water Rights Settlement Act of 1992. Consequently, Plaintiffs' nuisance claim is not reviewable under the APA and must be dismissed.

Id. at 884 (footnote omitted); *see also id.* at 896.

> Under *Nevada*, SCIIPs [sic] operation in compliance with the San Carlos Project Act of 1924 Act [sic] and the Globe Equity Decree of 1935 cannot be a breach of the Government's general trust responsibilities to the Plaintiffs.

Id. at 894.

> "Any claim that accrued before August 13, 1946, and which was not filed with the Commission by August 13, 1951, could not 'thereafter be submitted to any court or administrative agency for consideration,' nor could such a claim 'thereafter be entertained by the Congress.'" [Citation omitted.] Consequently, there is no jurisdiction for this Court to consider the breach of trust challenge to the propriety of SCIIP's operations and management in compliance with the San Carlos Act of 1924 and Globe Equity Decree of 1935.

Id. at 895.

C. The Tribe Seeks Relief That Is Contrary To The Injunction Contained In The Decree.

The Tribe assures this Court that it has not sought to upset or invalidate the Decree in the proceeding below. Petition at 9 n.15. It does contend, however, that it should be allowed both to retain the right to use 6,000 acre feet per annum of mainstem Gila River water on its reservation, a right recognized in the Decree (*see* Art. VI(2), Petitioner's Supp. App. at 198), and to press additional claims from that source. ASARCO App. 29-30; ASARCO App. 38-41. In contrast to the Tribe's position, Article XIII of the Decree enjoined those to whom rights were decreed, their agents and successors, "from asserting or claiming – as against any of the parties herein, their assigns or successors, or their rights as decreed herein – any right, title or interest in or to the waters of the Gila River, or any part thereof, except the rights specified, determined and allowed by this decree. . . ." Petitioner's Supp. App. at 225. *See also United States v. Gila Valley Irrig. Dist.*, *supra* at 2-3. Even while maintaining that the Decree should not preclude it from claiming additional water from the Gila River mainstem, the Tribe argued below that the Decree should be accorded res judicata effect as to certain claims of the Gila River Indian Community. ASARCO App. 31-32. The Tribe's insistence that the Decree's preclusive effect is neither mutual nor coextensive among the Decree parties is inconsistent with its assurance that the Decree's validity is not under assault.

D. The Globe Equity Court Ruled In 1983 That The Gila River Indian Community's Attempt To Overturn The Decree Was Untimely. The Tribe Shunned Its Opportunity To Seek Similar Relief And, If Necessary, Contest Such A Ruling In Its Own Circumstances.

The Tribe complains that the Arizona Supreme Court speculated on the outcome of an attack on the Decree in the District Court for the District of Arizona had the Tribe chosen to pursue one. Petition at 11 n.19. It also implies that the Arizona Supreme Court's expectation about that outcome was unfounded, reasoning that the District Court's 1983 refusal to allow the Gila River Indian Community to attempt to set aside the Decree resulted from the Pima Indian Tribal Council's failure to appeal the denial of its pre-Decree petition for leave to intervene. *Id.* The District Court's 1983 order, however, leaves no doubt that it considered the Indian Community's effort to overturn the Decree untimely, and as an aside, observed that even if it were to consider the Indian Community's effort, the Pima Indian Tribal Council's failure to appeal would preclude the Court from considering pre-Decree events. Petitioner's App. F at 214a-215a, 217a-218a. More important for purposes of evaluating the Petition, the Arizona Supreme Court followed its prediction of the outcome of such a challenge to the Decree by the Tribe with this observation:

> Had the Tribe believed that the district court erred in refusing to allow GRIC to intervene to attack the Decree, it could have sought to attack the Decree in its 1990 motion to intervene and then sought federal appellate review from any denial thereof. Had it done so, the federal courts could have conclusively addressed the issue. If

> we were today to consider the Tribe's privity arguments, we would be in effect rewarding its strategic choice to withhold making those arguments in the court that issued the Decree in order to seek a more favorable forum here.

212 Ariz. at --, 127 P.3d at 901; Petitioner's App. A at 46a.

E. Contested Case W1-206 Focused On Both Indian And Non-Indian Claims.

The scope of the state court's contested case W1-206, which gave rise to the decision challenged in the Petition, requires clarification in light of the Petition. That contested case addressed the preclusive effect of the Decree not only on the Tribe, but also on the Franklin Irrigation District and the Gila Valley Irrigation District. ASARCO App. 19. The Decree confirmed water rights for lands within these districts, with points of diversion upstream of the Tribe's reservation. Petitioner's Supp. App. at 1. The motions for summary judgment on which the Superior Court ruled related to these irrigation districts as well as the Tribe. *E.g.*, ASARCO App. 20-21. The Arizona Supreme Court had no occasion to discuss the preclusive effect of the Decree on the irrigation districts or their members because they did not appeal the Superior Court ruling. Contested case W1-206 did not single out the Tribe's water right claims for unusual scrutiny or leave non-Indian interests unaffected in its wake, as the Tribe implies. *See, e.g.*, Petition at 6, 15, 26, 27 n.34, 29-30.

F. The Tribe's Description Of Its Water Supply Situation Is Misleading.

The Tribe asserts that the Arizona Supreme Court's application of res judicata to bar further claims to the mainstem of the Gila River leaves residents of the Tribe's reservation without water for human or livestock consumption, gardens, economic development, and other purposes that may be associated with a "permanent tribal homeland." *E.g.*, Petition at 4, 15, 22, 26. This creates an inaccurate impression in several respects. First, the Arizona Supreme Court held that the Decree does not preclude the Tribe from claiming water from the tributaries to the Gila River. 212 Ariz. at --, 127 P.3d at 894; Petitioner's App. A at 26a. Therefore, the Tribe remains free to litigate its claimed right to water from the tributaries for such purposes in the Gila River Adjudication.

Second, the argument that the Tribe lacks water for purposes other than irrigation incorrectly implies that it has no opportunity to convert all or a portion of its decreed irrigation right to a right for other purposes. The Decree itself allows any party "to change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or of any part thereof, so far as they may do so without injury to the rights of other parties as the same are defined herein." Decree, Art. XI; Petitioner's Supp. App. at 224. The District Court established a rule implementing this provision. ASARCO App. 4-13. *See also United States v. Gila Valley Irrig. Dist.*, 920 F. Supp. 1444, 1478 (D. Ariz. 1996), *aff'd*, 117 F.3d 425 (9th Cir. 1997). The Tribe has not demonstrated to this Court or the Courts below that it ever requested such relief from the District Court, nor has it requested approval of a change in use from the Arizona Department

of Water Resources. *See, e.g., United States v. Orr Water Ditch Co.*, 391 F.3d 1077, 1081 (9th Cir. 2004), *as amended on denial of reh'g*, 400 F.3d 1117 (9th Cir. 2005).

Third, the Gila River is not the only water source available to satisfy the water needs of the Tribe's reservation. Pursuant to the San Carlos Apache Tribe Water Rights Settlement Act of 1992, Pub. L. No. 102-575, §§ 3701 et seq., 106 Stat. 4600, 4740, as amended, the Gila River Adjudication court confirmed the settlement of the Tribe's water right claims to the Salt and Black Rivers, which border northern portions of its reservation, and its claim to the San Pedro River. The settlement awarded the Tribe 71,445 acre feet of surface water per annum for use on its reservation. *See* ASARCO App. 16-18. Congress also authorized appropriation of $38,400,000 for the Tribe in accordance with the settlement, "to put to beneficial use the Tribe's water entitlement, to defray the cost to the Tribe of CAP [Central Arizona Project] operation, maintenance and replacement charges as appropriate, and for other economic and community development purposes." Pub. L. No. 102-575, § 3707(c) & (d), 106 Stat. 4748.[1]

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[1] The Tribe's criticism of the Gila River Adjudication ignores not only the 1992 settlement of some of its own claims, but also the significant benefits other Arizona Indian tribes in the Gila River Basin have reaped from water right settlements achieved since this Court's decision in *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983). *See* Salt River Pima-Maricopa Indian Community Water Rights Settlement Act of 1988, Pub. L. No. 100-512, 102 Stat. 2549; Fort McDowell Indian Community Water Rights Settlement Act of 1990, Pub. L. No. 101-628, Title IV, 104 Stat. 4469, 4480; Arizona Water Settlements Act of 2004, Pub. L. No. 108-451, Titles II & III, 118 Stat. 3478, 3499, 3536. It also fails to acknowledge, other than in two terse references, the tribes' successes in the Gila River Adjudication. *See* Petition at 27 n.35, 29.

(Continued on following page)

G. The Tribe's Description Of Pending Federal Actions Involving Its Water Right Claims Is Inaccurate.

The Petition incorrectly states that the Tribe's claims in the action captioned *San Carlos Apache Tribe v. Arizona*, CIV 79-186 PHX-PGR, remain pending in the District Court for the District of Arizona. *See* Petition at 5. Only the Tribe's claims to the Gila River are pending; its claims to the Black River and to the Salt River below its confluence with the Black River were dismissed pursuant to the settlement authorized by the San Carlos Apache Tribe Water Rights Settlement Act of 1992, *supra*. ASARCO App. 15.

H. The Tribe's Assertion That Some Of Its Claims To The Mainstem Of The Gila River Have Not Been Quantified Assumes The Opposite Of The Arizona Supreme Court's Conclusion.

The Tribe asserts that its alleged water rights to the mainstem of the Gila River arising under the "Law of Nations, as well as under Spanish, Mexican, and American law" have not yet been quantified. Petition at 1 n.2. This, of course, is precisely the opposite of the Arizona Supreme Court's holding below. 212 Ariz. at --, 127 P.3d at 894-95, Petitioner's App. A at 26a-31a. Apart from the Tribe's argument about the alleged inadequacy of the United States' representation of the Tribe's interests in negotiating the Decree, however, the Tribe's statement of issues does not actually dispute the Arizona Supreme

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The cited decisions dispel any notion that the Arizona Supreme Court might be hostile to tribal positions.

Court's resolution of this issue. The Tribe's contention also ignores the f[illegible] that the Decree extinguished any such claims by ope[illegible]on of res judicata. *See Rivet v. Regions Bank*, 522 U.S. 470, 476-77 (1998).

REASONS FOR DENYING THE PETITION

The Petition presents no issues or circumstances worthy of this Court's attention. On the contrary, the Arizona Supreme Court's decision addresses what the Tribe has conceded is a unique factual circumstance involving distinct legal questions, and did so in a manner consistent with this Court's precedent and the case law of the Federal Courts of Appeals.

A. The Arizona Supreme Court's Decision Is Consistent With This Court's Precedent And With The Case Law Of The Federal Courts Of Appeals.

1. The Arizona Supreme Court Is Required to Respect the Globe Equity Decree Unless that Decree Is Reversed or Modified by the Globe Equity Court or a Federal Appellate Court.

The Tribe's implied premise is that once it asserts the Decree does not bind it, the Arizona Supreme Court may not operate on the assumption that the Decree is valid as to the Tribe. This Court has observed, however, that "'[i]t is for the court of first instance to determine the question of the validity of the law, and until its decision is reversed for error by orderly review, either by itself or by a higher court, its orders based on its decision are to be respected.'" *Celotex Corp. v. Edwards*, 514 U.S. 300, 313 (1995).

This Court delivered the same message in *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981):

> A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1877). Nor are the res judicata consequences of a final, unappealed judgment on the merits altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case. *Angel v. Bullington*, 330 U.S. 183, 187 (1947); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Wilson's Executor v. Deen*, 121 U.S. 525, 534 (1887). As this Court explained in *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 325 (1927), an "erroneous conclusion" reached by the court in the first suit does not deprive the defendants in the second action "of their right to rely upon the plea of *res judicata*. . . . A judgment merely voidable because based upon an erroneous view of the law is not open to collateral attack, but can be corrected only by a direct review and not by bringing another action upon the same cause [of action]." We have observed that "[t]he indulgence of a contrary view would result in creating elements of uncertainty and confusion and in undermining the conclusive character of judgments, consequences which it was the very purpose of the doctrine of *res judicata* to avert." *Reed v. Allen*, 286 U.S. 191, 201 (1932).

Accord Deposit Bank v. Frankfort, 191 U.S. 499, 512, 520-21 (1903).

Res judicata does not bar a *direct* attack on a federal district court judgment through an appeal to the appropriate Court of Appeals, *see Orion Tire Corp. v. Goodyear Tire & Rubber Co.*, 268 F.3d 1133, 1135-36 (9th Cir. 2001), or a *direct* attack in the district court that entered the judgment. *Plotner v. AT&T Corp.*, 224 F.3d 1161, 1170 (10th Cir. 2000); *Watts v. Pinckney*, 752 F.2d 406, 410 (9th Cir. 1985). A direct attack on a judgment is "'an attempt to correct it, or to void it, in some manner provided by law to accomplish that object. It is an attack . . . by appropriate proceedings between the parties to it seeking, for sufficient cause alleged, to have it annulled, reversed, vacated or declared void.'" *Id.* (citation omitted). The Petition advances arguments that, if appropriate anywhere, should have been presented to the Court of Appeals for the Ninth Circuit, or more likely, to the Globe Equity Court.

Res judicata does bar a *collateral* attack on a judgment where its prerequisites are met. *Orion Tire Corp.*, *supra*, 268 F.3d at 1136; *Plotner*, *supra*, 224 F.3d at 1172. A collateral attack is one that attempts to defeat a defense asserting the preclusive effect of a judgment, such as res judicata, without overturning the judgment itself. *See id.* at 1170. The Petition presents an impermissible collateral attack on the Decree.

Courts of Appeals have ruled that only the district court entering the judgment has jurisdiction over an independent action under FRCP 60(b) to set aside a decree. *See Plotner*, 224 F.3d at 1172; *H.K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1117, 1120 (6th Cir. 1976). To the extent the Tribe's unsuccessful effort to modify the Decree in *San Carlos Apache Tribe v. United States*, *supra* at 3, 4, represented an attempt at

relief under FRCP 60(b), it at least was filed in the correct District Court, although the Tribe failed to join most parties to the Decree and their successors in interest (including ASARCO) as parties.

The Tribe successfully moved to intervene as a plaintiff in the Globe Equity litigation in 1990. In doing so, however, it expressly disclaimed any intention to challenge the Decree. ASARCO App. 1-2; ASARCO App. 3. The Tribe's election to forsake the appropriate forum in which to assert its current challenge to the Decree in favor of the Gila River Adjudication was a conscious one, from which the Arizona Supreme Court had no obligation or ability to rescue it. The Arizona Supreme Court does not sit in review of the Globe Equity Court: "[T]he sovereignties are distinct, and neither can interfere with the proper jurisdiction of the other, . . . and hence the State courts have no power to revise the action of the Federal courts. . . . " *Claflin v. Houseman*, 93 U.S. 130, 137 (1876). As observed in *Paul Revere Variable Annuity Ins. Co. v. Zang*, 248 F.3d 1, 6 (1st Cir. 2001): "The law presumes that parties will make choices to protect their legal interests, even though those choices may at times involve a calculated risk. Where a party makes a considered choice, though it may involve some calculated risk, he 'cannot be relieved of such a choice because hindsight seems to indicate to him' that, as it turns out, his decision was 'probably wrong.'" (Citation omitted.) The Arizona Supreme Court correctly concluded that the Tribe's strategy of intentionally forgoing recourse to the Globe Equity Court in favor of the state court forum is not one it should countenance. 212 Ariz. at --, 127 P.3d at 898-901; Petitioner's App. A at 40a-47a.

2. Prior Tribal Challenges to Decrees Based On Alleged Inadequate Representation, Cited in the Petition, Were Presented in the First Instance to the Court That Entered the Contested Decree.

The decisions of this Court on which the Tribe relies provide it no solace. The Tribe contends on one hand that this Court "acknowledged the defense of inadequate representation as viable under the law," citing *Arizona v. California*, 460 U.S. 605 (1983), *see* Petition at 24, and "did not consider or rule against the viability of the legal defense of inadequate representation" in *Nevada v. United States*, 463 U.S. 110 (1983). *See* Petition at 23 n.32. Regardless of whether the Tribe's characterization of those decisions is correct, in each case the allegation of inadequate representation was presented to the Court that originated the decree at issue. In *Arizona v. California*, *supra*, the tribes advanced the defense with respect to this Court's disposition in *Arizona v. California*, 373 U.S. 546 (1963) (opinion), and 376 U.S. 340 (1964) (decree). *See Arizona v. California*, 460 U.S. at 626-28. Similarly, the Pyramid Lake Paiute Tribe asserted its contention of inadequate representation in the first instance before the district court that entered the Orr Ditch Decree, in the course of litigation leading to *Nevada v. United States*. *See* 463 U.S. at 113. This is precisely the process required by the Arizona Supreme Court's decision challenged here.

3. The McCarran Amendment Did Not Diminish the Globe Equity Court's Jurisdiction to Entertain a Challenge to the Decree, and the Doctrine of Prior Exclusive Jurisdiction at a Minimum Supports the Arizona Supreme Court's Decision Not To Entertain the Tribe's Collateral Attack on the Decree.

The McCarran Amendment, 43 U.S.C.A. § 666, and this Court's interpretation of the Amendment, do not suggest, let alone require, a result different from that reached by the Arizona Supreme Court. The Amendment did not destroy or limit the jurisdiction of federal courts, but rather consented to concurrent jurisdiction in state courts over controversies involving federal rights to water. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 809 & n.15 (1976); *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559 n.10 (1983).

This Court, in *Colorado River*, cited its prior rulings stating that the court first assuming jurisdiction over property may exercise that jurisdiction to the exclusion of other courts. *See* 424 U.S. at 818. The Court of Appeals for the Ninth Circuit labels this the doctrine of prior exclusive jurisdiction, providing that "'when a court of competent jurisdiction has obtained possession, custody, or control of particular property, that possession may not be disturbed by any other court.'" *State Eng'r v. South Fork Band*, 339 F.3d 804, 809 (9th Cir. 2003) (citations omitted). In the Ninth Circuit's view, while the doctrine is based in part on considerations of comity, it is a mandatory jurisdictional limitation. *Id.* at 810.

The Ninth Circuit has applied the doctrine of prior exclusive jurisdiction at least twice in connection with water right decrees. *South Fork Band* involved the

Humboldt Decree, which was entered by a Nevada state court. The Court of Appeals held that the federal district court lacked jurisdiction over contempt proceedings initiated to compel the South Fork Band to comply with the decree, because the state court's jurisdiction first attached over what was a quasi in rem proceeding.

South Fork Band was foreshadowed by the ruling in *United States v. Alpine Land & Reservoir Co.*, 174 F.3d 1007 (9th Cir. 1999). That dispute arose from applications to change the place of diversion or manner or place of use of water rights adjudicated under the Orr Ditch Decree and Alpine Decree, both entered by a federal district court in Nevada. The Court of Appeals affirmed an injunction prohibiting the Nevada state court from hearing an appeal of the State Engineer's decision to grant the applications. It reasoned that the "actions that resulted in the Orr Ditch and Alpine Decrees are sufficiently analogous to *in rem* actions to provide the district court with exclusive jurisdiction." *Id.* at 1013. The Court also observed that "[s]o long as the dispute in this case is related to the district court's earlier Decrees, the district court retains jurisdiction to adjudicate the dispute." *Id.* at 1012 n.5.

The McCarran Amendment left the Globe Equity Court's jurisdiction undisturbed, and the doctrine of prior exclusive jurisdiction at the very least cautioned the Arizona Supreme Court not to entertain a collateral attack on that Court's Decree. The Arizona Supreme Court's decision is consistent with this Court's and the Ninth Circuit's precedent.

4. The "Comprehensiveness" Standard of the McCarran Amendment Does Not Require That Previously Decreed Rights Be Relitigated.

This Court has ruled that a general stream adjudication does not fail the McCarran Amendment's "comprehensiveness" standard simply because it is a supplemental determination of rights acquired since completion of the last adjudication. *United States v. District Court in and for Eagle County*, 401 U.S. 520, 525-26 (1971); *see also United States v. Oregon*, 44 F.3d 758, 767-68 (9th Cir. 1994), *cert. denied*, 516 U.S. 943 (1995). Conflicts between earlier decreed rights and subsequently adjudicated federal reserved rights can be resolved if preserved. *United States v. District Court in and for Eagle County*, *supra*, 401 U.S. at 525-26. There is no conflict between the Decree's settlement of federal reserved right claims and the Gila River Adjudication, because the Arizona Supreme Court found the Decree binding on those holding rights under it to the extent of its proper scope. The Arizona Supreme Court's election not to permit the Tribe's collateral attack on the Decree in the Gila River Adjudication does not violate the McCarran Amendment's requirements.

B. The Petition Does Not Present An Appropriate Defense To Privity Even If The Allegations Were True.

The Tribe's insistence on retaining its decreed right while pursuing additional mainstem claims, *see supra* at 5, is fundamentally inconsistent with its theory of inadequate representation. The Court in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 259 (2d Cir. 2001), *aff'd*

in part and vacated in part by an equally divided Court, 539 U.S. 111 (2003) (per curiam), considered a claim of inadequate representation in the class action settlement context. The plaintiffs were class members denied all recovery because their injuries did not manifest themselves until after the settlement fund had expired, despite the fact that the settlement purported to resolve all future claims. 273 F.3d at 260-61. The Court of Appeals agreed that the plaintiffs were not represented adequately: "Because these plaintiffs were inadequately represented in the prior litigation, they were not proper parties and cannot be bound by the settlement." *Id.* at 261; *see also id.* at n.8.

There is a significant difference, however, between the Tribe's position in this case and that of the plaintiffs in *Stephenson*. The Court in *Stephenson* explained:

> Plaintiffs do not attack the merits or finality of the settlement itself, but instead argue that they were not proper parties to that judgment. If plaintiffs were not proper parties to that judgment, as we conclude below, res judicata cannot defeat their claims. Further, such collateral review would not, as defendants maintain, violate defendants' due process rights by exposing them to double liability. Exposure to liability here is not duplicative if plaintiffs were never proper parties to the prior judgment in the first place.

Id. at 259. In contrast to the *Stephenson* plaintiffs, who received nothing under the prior settlement, the Tribe clings to its right under the Decree to 6,000 acre feet per annum, a right the United States negotiated successfully on the Tribe's behalf, while attempting to avoid the

injunction in Article XIII of the Decree. The Tribe cannot retain both a water right recognized in the Decree and its standing to demand the Decree's enforcement, while remaining free of the Decree's injunction. As the Globe Equity Court ruled, "the Decree was intended as a complete statement of the rights of the various parties to the waters of the Gila River." *United States v. Gila Valley Irrig. Dist.*, 804 F. Supp. at 10.

C. The Petition Presents No Issues Warranting This Court's Attention.

The Tribe would have this Court believe that the Tribe's inability to litigate its privity defense to res judicata in the Gila River Adjudication is a matter of grave constitutional moment that this Court should address. Petition at 23-24. It is not. The Arizona Supreme Court applied straightforward federal claim preclusion law to a fact pattern even the Tribe admits is unusual.

First, the Tribe voluntarily foreclosed the only avenue available to present such a defense, and it is now struggling to avoid the consequences. That situation is unlikely to be a common one.

Further, the ruling below will have little impact beyond the Gila River Watershed. The Tribe itself repeatedly emphasized before the Arizona Supreme Court the individuality of the Decree and of the Tribe's arguments and history relating to that Decree. It characterized the Decree as "a unique and unprecedented contract," ASARCO App. 35, and the United States' rights for the Tribe's reservation as having "unique characteristics." *Id.* at 35-36; *see also* ASARCO App. 27. It described the facts related to its reservation as

"fundamentally distinct" from those pertaining to the Gila River Indian Community's reservation, which lies downstream on the same river adjudicated by the Decree. ASARCO App. 22; *see also* ASARCO App. 25-26; ASARCO App. 33-34. It informed the Arizona Supreme Court that the Tribe's claims involve "unique facts." ASARCO App. 23. Similarly, it described the "unique legal and factual issues posited by the Apache Tribe's motion for summary judgment." *Id.* at 23-24; *see also* ASARCO App. 27-28; ASARCO App. 33. It ascribed a similar character to its petition for interlocutory review before the Arizona Supreme Court. ASARCO App. 27. The Tribe referred to itself as "culturally and legally distinct." ASARCO App. 25-26. It cited "the unique factual history involving these two very different Indian tribes," contrasting itself to the Gila River Indian Community. ASARCO App. 30; *see also id.* at 30-31; ASARCO App. 37.

Against this backdrop, this Court's review cannot be justified on the basis that the ruling below will have broad application, or that it somehow represents a departure from established federal law. The Petition is merely the last leg in an unsuccessful trek across the legal landscape in search of a favorable venue.

In desperation the Tribe argues that if the Arizona Supreme Court's decision is not reversed, the Tribe will be prevented from "proving its rights to the mainstream of the Gila River [which] defeats the very purpose behind the Apache Reservation," leaving it "unable to support itself in its 'permanent tribal homeland' as anticipated by this Court in *Winters* [*v. United States*, 207 U.S. 564 (1908)]." Petition at 22. The Pyramid Lake Paiute Tribe and its Trustee no doubt felt passionately about the need for sufficient water to preserve Pyramid Lake and maintain

natural spawning grounds in the lower reaches of the Truckee River. *See Nevada v. United States*, 463 U.S. at 119. There this Court concluded:

> We also hold that the Tribe, whose interests were represented in *Orr Ditch* by the United States, can be bound by the *Orr Ditch* decree. This Court left little room for an argument to the contrary in *Heckman v. United States*, 224 U.S. 413 (1912), where it plainly said that "it could not, consistently with any principle, be tolerated that, after the United States on behalf of its wards had invoked the jurisdiction of its courts . . . these wards should themselves be permitted to relitigate the question." *Id.*, at 446. See also Restatement (Second) of Judgments § 41(1)(d) (1982). We reaffirm that principle now.

Nevada v. United States, 463 U.S. at 135 (footnotes omitted). The Petition offers not a single cogent reason why this Court should accept review of the decision below, when that decision falls squarely within the reasoning in *Nevada*. Entertaining the Petition would waste this Court's limited resources.

CONCLUSION

The Tribe's Petition for Writ of Certiorari is without merit and should be denied.

Respectfully submitted this 4th day of October, 2006.

FENNEMORE CRAIG, P.C.
LAUREN J. CASTER
Counsel of Record
MICHAEL J. PEARCE
3003 North Central Avenue
Suite 2600
Phoenix, AZ 85012-2913

Attorneys for Respondent
ASARCO LLC

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, and GILA RIVER INDIAN COMMUNITY, Plaintiff in Intervention, vs. GILA VALLEY IRRIGATION DISTRICT, et. al., Defendants.	GLOBE EQUITY NO. 59 (JCC) **MOTION TO INTERVENE AS PLAINTIFF** [May 25, 1990]

* * *

[6] All of the above allegations are within the continuing jurisdiction of this Court in this matter to review, and to make orders for the enforcement of the terms of the Decree as the Court deems proper.

None of the above allegations seek to vacate the Decree, or re-litigate issues. The APACHE TRIBE does not seek to litigate rights to additional Gila River water in this matter, and no allegations have been made in the proposed Complaint in Intervention regarding *Winters* water rights. However, the APACHE TRIBE has been and will continue to litigate its claims to federally reserved *Winters* water rights in State Court in the State of Arizona "Gila River Adjudication" matter captioned *In The General Adjudication of All Rights to Use Water in the Gila River System and*

Source, W-1 (Salt), W-2 (Verde), W-3 (Upper Gila), W-4 (San Pedro), which is now pending in the Maricopa County Superior Court before the Hon. Stanley Z. Goodfarb.

Thus, the APACHE TRIBE in the proposed Complaint in Intervention, seeks only the enforcement of its water rights [7] granted under the terms of the Decree which is the subject matter of the Court's continuing jurisdiction in this matter.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. GILA RIVER INDIAN COMMUNITY, Plaintiff in Intervention, vs. GILA VALLEY IRRIGATION DISTRICT, et al., Defendants.	GLOBE EQUITY NO. 59 (JCC) ORDER [July 16, 1990]

* * *

[2] San Carlos Apache Tribe's Motion For Intervention is GRANTED on all Counts; and is STAYED as to Count VI.

* * *

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, and GILA RIVER INDIAN COMMUNITY, Plaintiff in Intervention, and SAN CARLOS APACHE TRIBE, Plaintiff in Intervention, v. GILA VALLEY IRRIGATION DISTRICT, et al., Defendants.	GLOBE EQUITY NO. 59 (JCC) MEMORANDUM AND ORDER [September 23, 1993]

* * *

[13] IV. Changes in Points of Diversion and Places, Means, Manner or Purpose of the Use of the Waters of the Gila River

Issue – Should the court adopt the rule drafted by the Water Commissioner which sets forth a procedure governing transfers of water rights prescribed by the Decree?

In applicable part, Article XI of the Decree provides that

> any of the parties to whom rights to water have been decreed herein shall be entitled, in accord with applicable laws and legal principles to change the point of diversion and the places, means, manner or purpose of the use of the waters to which they are so entitled or any part thereof, so far as they may do so with out injury to the rights of other parties as the same are defined herein.

In its Memorandum and Order dated September 15, 1992, the court directed the Rules Committee to prepare and submit proposed rules for transferring water rights. These rules were to be substantially similar to the Arizona water transfer statute, and provide adequate notice of proposed changes to the parties to the Decree and for summary review by the court. *Gila River,* 801 F. Supp. at 12. After several meetings of the Rules Committee, however, it became apparent that agreement would not be forthcoming. Accordingly, on the basis of the arguments set forth in the briefing and at the May, 1993 hearing, the court hereby adopts the following rule governing the transfer of water rights under the Decree:

[14] Section 1. Application for change in the point of diversion, place, means, manner or purpose of the use of waters subject to the Gila Decree

A. An application for a change in the point of diversion, place, means, manner or purpose of use of waters subject to the Gila Decree shall be filed with the Gila Water Commissioner (a "Change in Use Application").

B. The applicant, shall, at the time of filing the Change in Use Application with the Commissioner, pay a filing fee, to be determined by the Commissioner and approved by the court, and shall deposit with the Commissioner an amount sufficient to cover all costs associated with the processing of the Change in Use Application, including mailing and publication costs.

C. The application shall be in such form as prescribed by the Commissioner and shall include:

1. Name, address and telephone number of the applicant;

2. Location of existing point of diversion or place of use (legal description and map/survey) and proposed new manner of use;

3. Location of proposed new point of diversion of [sic] place of use (legal description and map/ survey) and proposed new manner of use;

4. Quantity of water involved in the change and rate of diversion (if only a portion of the water right is proposed to be transferred, a statement of how remainder will be used);

5. Purpose for which the application is filed;

6. Reference to the Gila Decree wherein the water right was defined and adjudicated and the priority date of such right;

7. Purpose of existing use and proposed purpose of use;

8. Name, address and telephone number of irrigation district or project within which existing right is used;

9. Name, address and telephone number of irrigation district within which the right would be transferred to;

10. Name of canal company presently delivering water under right and name of canal company which would deliver [15] water under proposed transfer;

11. A description of the historical use of the water right for the last ten (10) years; and

12. Such other information as may be necessary to permit complete understanding of the proposed change.

D. The application shall be accompanied by the written consent and approval of the governing body of each irrigation district, irrigation project and canal company named in C.8, 9 and 10 above or the statement of the applicant that a written request for such consent and approval was delivered or mailed, return receipt requested, to such body and forty-five (45) days have elapsed since the receipt of the application and request for approval by such body. Failure of such governing body to approve or reject the proposed application within 45 days after receipt shall constitute approval of the application.

E. A separate application must be filed for each water right affected by the proposed change or changes.

F. The applicant shall state under oath that the information contained in the application is true and correct, to the best of the applicant's knowledge at the time of filing.

G. Failure to provide the foregoing information and approvals will result in rejection of the application.

H. (1) No change in the point of diversion, place, means, manner or purpose of use shall be made under these Rules with respect to any decreed right to water which, under applicable law, has been forfeited or abandoned.

(2) The Commissioner is not authorized to make any determination as to whether a water right has or has not been abandoned or forfeited. If an objection to an application is that the water right has been abandoned or forfeited, such objection shall be determined in proceedings before the United States District Court under Section 4 herein, and the Commissioner shall not deny an application on the basis of abandonment or forfeiture.

I. If the Commissioner denies an application for any reason the applicant shall have the right to have the application heard by the court upon filing of a complaint as provided in Article XII of the Gila Decree; provided that such complaint shall also be served in accordance with Federal Rule of Civil Procedure 5(b) on the parties listed in Section 2, paragraph B.

J. If the Commissioner denies an application because the [16] applicant has failed to comply with any provision

of these rules, the applicant may file another application with the Commissioner which complies with these rules.

Section 2. Notice of Change in Use Application

A. Any party holding a water right adjudicated under the Gila Decree may file a written request with the Commissioner for special notice of all Change in Use Applications filed pursuant to these rules. The request shall state the mailing address of the party. The Commissioner shall keep a list of such requests. The Commissioner may periodically, but not more frequently than once a year, require by written notice to each such party a renewal of such request for notice.

B. Within 30 days after the application is filed the Commissioner shall send, by certified mail, return receipt requested, a copy of the application, together with a copy of a written notice setting forth the date by which objections to the application must be filed in the office of the Commissioner, to: The United States, c/o The United States Department of the Interior, Office of the Field Solicitor; Bureau of Indian Affairs, Phoenix Area Office and Superintendent, San Carlos Agency; The Franklin Irrigation District; The Gila Valley Irrigation District; The San Carlos Apache Tribe, The Gila River Indian Community; The San Carlos Irrigation and Drainage District; The San Carlos Project; The State of Arizona, c/o the Attorney General; ASARCO, Inc.; any canal companies named in the application and to each party who has filed with the Commissioner a request for special notice. Parties to whom notice is to be mailed shall file with the Commissioner a list of names and addresses to which the

notice shall be mailed which may include counsel for such parties.

C. The Commissioner shall also cause a copy of the notice of Change in Use Application to be published once a week for three successive weeks in a newspaper of general circulation in the county and counties in which the change is to occur (and in the counties of Greenlee, Graham, Pinal and Maricopa, Arizona).

D. The notice of Change in Use Application shall set forth:

(1) That the application has been filed;

(2) The date of filing;

(3) The name and address of the applicant;

(4) The location of the existing point of diversion or place of use and present manner of use;

(5) The location of the proposed new point of diversion or place of use and proposed new manner of use;

(6) The quantity of water involved in the proposed [17] change;

(7) Names of irrigation district or irrigation project and canal companies affected by the proposed change;

(8) The purpose for which the application has been filed;

(9) Date by which objections must be filed with the Commissioner.

Section 3. Objections to Change is [sic] Use Application

A. An objection to a Change in Use Application may be filed under these rules only by a person, corporation, governmental agency, Indian Tribe or other entity holding a water right under the Gila Decree for itself or in trust for another.

B. An objection to the application shall be in writing and verified and shall be filed in the office of the Commissioner on or before the date specified in the notice which shall be a date 90 days after the date of the last publication of the notice. An objection shall set forth the name, address and telephone number of the objector and shall set forth the grounds for the objection in a manner to permit complete understanding of the objection.

C. Within ten (10) business days after an objection is filed, the objecting party shall send a copy of the objection in the manner and to the parties specified in paragraph 2.B above. An objection shall also be filed within such time with the United States District Court which shall be served in accordance with Federal Rule of Civil Procedure 5(b).

D. If no objection to the application is filed in the Office of the Commissioner on or before the date specified in the notice, the Commissioner shall grant or deny the application on the basis of the information contained in the application. If the Commissioner approves the application, the Commissioner shall forthwith file the application with the Clerk of the Court with the Commissioner's affidavit setting forth the matters contained in the notice and stating that no objection has been filed pursuant to these Rules and that the Commissioner has approved the application and

shall submit an order to the court for the court's approval of the change in use. The applicant shall be responsible for the costs of preparation of such affidavit and order.

E. A party who fails to file a timely objection with the Commissioner may not object to a proposed transfer during review by the court.

Section 4. Proceedings Before the Court

[18] A. Upon the filing and service of an objection as provided in Section 3, paragraph B, the applicant or objector may request an evidentiary hearing before the court. The Federal Rules of Evidence shall apply to such hearings and the matter shall be tried without a jury.

B. The applicant shall have the burden of establishing a prima facie case of no injury to the rights of other parties under the Gila Decree and a right to transfer. Upon making such a prima facie showing, the burden of proof of proof [sic] will shift from the applicant to the objecting party to demonstrate that injury will result from the proposed change or that the applicant has no right to the proposed transfer.

C. The decision of the court regarding a Change in Use Application shall not take effect until the court enters an order approving the change and such decision becomes final. The applicant or objecting party shall have the right to appeal the order in accordance with the Federal Rules of Appellate Practice.

D. A party may seek an expedited hearing before the court upon a showing of exigent or exceptional circumstances by filing a motion for an expedited hearing

at the time a complaint is filed or subsequent to filing of a complaint as warranted by the circumstances.

E. A party found to have filed a frivolous Change in Use Application or asserting a frivolous objection thereto may be assessed costs at the discretion of the court.

* * *

AMENDMENT No. 3

TO THE SAN CARLOS APACHE TRIBE WATER RIGHTS SETTLEMENT AGREEMENT

[December 16, 1999]

* * *

[1] **3.0** Subparagraph 4.1 at page 11, lines 1 through 6 is amended as follows (new language is italicized):

PARAGRAPH REFERENCE	SOURCE	MAXIMUM DIVERSION AMOUNT (AF/YR)
5	Salt/Black River	7,300
11	The Tribe's CAP Contract (original)	12,700
9	Ak-Chin CAP Allocation (referred to in Sections 3704(a) and 3704(b) of the Act) in normal years up to	33,300
10	CAP M&I Priority Water Previously Allocated to Phelps Dodge Corporation	14,665[3]
13	*CAP M&I Priority Water Previously Allocated to City of Globe*	*3,480*
		71,445

* * *

[3] Number used in the Act is incorrect.

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

PHOENIX DIVISION

SAN CARLOS APACHE TRIBE OF ARIZONA, Plaintiff, vs. STATE OF ARIZONA, et al., Defendants.	Cause No. CIV 79-186 PHX-PGR **NOTICE OF DISMISSAL OF CERTAIN CLAIMS TO WATER** [Undated]

[1] The San Carlos Apache Tribe (herein "the Apache Tribe"), Plaintiff, pursuant to Rule 41(a) of the Federal Rules of Civil Procedure, gives Notice of Dismissal with prejudice of all claims against THE STATE OF ARIZONA, THE STATE LAND DEPARTMENT OF THE STATE OF ARIZONA; and JOHN M. LITTLE and SALT RIVER VALLEY WATER USERS' ASSOCIATION, Defendants in this action, as to surface water to the Black River and the Salt River below its confluence with the Black River, as specified in that Settlement Agreement dated March 30, 1999, between and among the Tribe, the United States, the Salt River Valley Water Users' Association, the Salt River Project Agricultural Improvement and Power District and other parties pursuant to the San Carlos Apache Tribe Water Rights Settlement Act of 1992 PL-102-575, as [2] amended, hereafter referred to as the "Settlement Agreement," which is attached and made a part of this Notice.

* * *

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR THE COUNTY OF MARICOPA

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) Consolidated Contested Case No. W1-204 JUDGMENT AND DECREE [December 21, 1999]

[1] 1. The Court has approved the Settlement Agreement dated March 30, 1999, permanently resolving certain water rights claims of the San Carlos Apache Tribe (hereinafter referred to as the "Tribe") and of the United States acting on behalf of the Tribe that are subject to the Court's jurisdiction in this case, a copy of which Settlement Agreement is attached as Attachment 1 to the Stipulation and Request for Entry of Judgment and Decree. In this Judgment and Decree, the term "Settlement Agreement" shall include Amendment Numbers 1, 2, and 3 thereto.

2. The conditions to the enforceability of the Settlement Agreement, set forth in Paragraph 22.4 of the Settlement Agreement, have been satisfied.

* * *

[5] 12. Subject to the qualifications set forth in Paragraphs 13 and 17 hereof, neither the Tribe nor the United States acting on behalf of the Tribe shall have any right to Divert Surface Water from the Main Stem of the San Pedro River or its off-Reservation Tributaries.

* * *

[6] 17. Subparagraphs 4.2.1, 4.2.3, 4.3, 4.4, 4.5, 5.1, 5.2 and 7.0 of the Settlement Agreement, which define the rights of the Tribe and the United States on behalf of the Tribe to Surface Water from the San Pedro River, the Black River, the Salt River below its confluence with the Black River and Tributaries to these rivers, to Groundwater beneath the Reservation, and to Effluent shall be binding on all parties to the Gila River Adjudication other than as specifically excepted by Subparagraph 18.3(f) of the Settlement Agreement. Subparagraph 4.2.2 of the Settlement Agreement, which defines the rights of the Tribe and the United States on behalf of the Tribe to Surface Water from Tributaries to the Gila River, shall be binding on all Parties to the Settlement Agreement, but shall not be binding on any other parties to the Gila River Adjudication.

18. Neither this Judgment and Decree nor the Settlement Agreement shall limit, interfere with or affect in any way, any right the United States or the Tribe may have under the Globe Equity Decree.

[7] 19. The Tribe, and the United States acting on its behalf, reserve the right to assert, as specified in Subparagraphs 18.3(f), (g) and (h) of the Settlement Agreement, in the Gila River Adjudication or other court of competent jurisdiction: (1) claims against certain non-settling entities for the water supplies described in Paragraphs 4.0 and 5.0 of the Settlement Agreement, and to the Gila River and its tributaries, other than the San Pedro River and its off-Reservation tributaries, upstream of Gila Crossing; (2) objections contesting all water uses and/or claims for water rights by the non-settling entities; and (3) objections contesting the applicability of Arizona law to the

Reservation and to the water rights the Tribe and the United States acting on behalf of the Tribe.

* * *

[8] 25. Notwithstanding any other provision of this Judgment and Decree, nothing in this Judgment and Decree or in the Settlement Agreement shall limit, interfere with, or affect in any way any rights the parties to the Globe Equity Decree and their successors may have to divert and/or apply the waters of the Gila River pursuant to the Globe Equity Decree, any rights they may have to enforce the provisions of the Globe Equity Decree, and/or whatever rights they may have, if any, to pump on and/or apply Groundwater from wells located on or near lands that have a decreed right under the Globe Equity Decree, provided, [9] however, nothing in this Judgment and Decree shall be construed to determine whether or not the parties to the Globe Equity Decree may claim additional rights under the Globe Equity Decree, to such wells or to such Groundwater, based on changes in the law that may occur after the date of this Judgment and Decree.

* * *

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF MARICOPA

IN CHAMBERS (X) IN OPEN COURT ( )

SPECIAL MASTER JOHN E. THORSON
Presiding

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) Consolidated **Contested Case No. W1-206** Date: January 4, 2000

* * *

[2] 1. **Contested Case Designation**

This contested case is named and numbered as follows:

Contested Case Name: *In re the Preclusive Effect of the Globe Equity No. 59 Decree on Specified Parties.*

The "specified parties" are San Carlos Apache Tribe, Franklin Irrigation District, and Gila Valley Irrigation District.

Contested Case Number: W1-206.

* * *

SUPERIOR COURT OF ARIZONA

MARICOPA COUNTY

IN RE THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	W-1 (Salt) W-2 (Verde) W-3 (Upper Gila) W-4 (San Pedro) (Consolidated) **Contested Case No. W1-206** **ASARCO INCORPORATED'S MOTION FOR SUMMARY JUDGMENT REGARDING THE PRECLUSIVE EFFECT OF THE GLOBE EQUITY NO. 59 DECREE ON THE SAN CARLOS APACHE TRIBE, FRANKLIN IRRIGATION DISTRICT, AND GILA VALLEY IRRIGATION DISTRICT** [March 8, 2001]

* * *

[2] Pursuant to Rule 56, Arizona Rules of Civil Procedure, ASARCO Incorporated ("ASARCO") moves for summary judgment regarding the preclusive effect of the Globe Equity Decree on the water right claims of the San Carlos Apache Tribe, Franklin Irrigation District, and Gila Valley Irrigation District. This Motion is supported by the following Memorandum of Points and Authorities, and by the separately filed Statement of Facts ("SOF").

The principles of res judicata bar the San Carlos Apache Tribe from re-litigating its claims to waters of the

Gila River and the San Carlos River. It is free to litigate its claims, if any, to other tributaries to the Gila River provided its means of diversion from those tributaries does not involve diversions from either the Gila River or the San Carlos River. Similarly, the Franklin Irrigation District and the Gila Valley Irrigation District and their members are barred by the principles of res judicata from re-litigating their claims to the Gila River. They are free to litigate their claims, if any, to tributaries to the Gila River so long as their means of diversion from those tributaries do not involve diversions from the Gila River.

* * *

[20] CONCLUSION

"The policies advanced by the doctrine of res judicata, perhaps are at their zenith in cases concerning real property, land and water." *Nevada v. United States*, 463 U.S. at 129 n.10. Those policies mandate that the Globe Equity Decree bar the San Carlos Apache Tribe's claims to the Gila River beyond those adjudicated to it in the Decree, that it be precluded from asserting any claims to the San Carlos River, and that the Gila Valley Irrigation District and the Franklin Irrigation District and their members be foreclosed from asserting claims to the Gila River not recognized in the Decree. The San Carlos Apache Tribe, the Gila Valley Irrigation District and the Franklin Irrigation District and their members, remain free to assert claims to tributaries to the Gila River other than the San Carlos River so long as those claims do not involve diversions from the Gila River or the San Carlos River.

* * *

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.

Supreme Court No.

Maricopa County
Nos. W-1, W-2, W-3, W-4
(Consolidated)

[Contested Case No. W1-206]

[November 19, 2002]

THE SAN CARLOS APACHE TRIBE'S PETITION FOR INTERLOCUTORY REVIEW OF THE GRANT OF PARTIAL SUMMARY JUDGMENT BY THE SUPERIOR COURT IN W1-206

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* * *

[9] The facts and circumstances related to the San Carlos Apache Reservation are fundamentally distinct from those related to the GRIC Reservation. The trial court's ruling on *res judicata* of Globe Equity will have profoundly disproportionate impact on the Apache Tribe.

* * *

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.	Supreme Court No. Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated) [Contested Case No. W1-206] [January 22, 2003]

THE SAN CARLOS APACHE TRIBE'S REPLY TO THE UNITED STATES' RESPONSE TO TRIBE'S PETITION FOR INTERLOCUTORY REVIEW OF THE GRANT OF PARTIAL SUMMARY JUDGMENT BY THE SUPERIOR COURT IN W1-206

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* * *

[6] First, as a procedural matter, the Apache Tribe requests that this Court rule as a matter of law that the Superior Court erred when it: (1) failed to address the unique facts related to the Apache claims by incorporating the statement of facts for the separate and distant Indian Reservation, (GRIC) found in its Order from contested case W1-203 as the basis for its ruling on the Apache claims in W1-206, even though the underlying facts respecting GRIC Reservation in W1-203 have little or no applicability to the facts set forth by the [7] Apache Tribe for its Reservation in W1-206; (2) denied the Apache Tribe a trial on the merits despite the numerous material facts in dispute; and (3) refused to issue a separate opinion and order with respect to the unique legal and factual issues

posited in the Apache Tribe's motion for summary judgment.

* * *

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.	Supreme Court No. Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated) [Contested Case No. W1-206] [February 3, 2003]

THE SAN CARLOS APACHE TRIBE'S CONSOLIDATED REPLY TO RESPONSES OF PHELPS DODGE CORPORATION, SALT RIVER PROJECT, CITY OF SAFFORD, AND ASARCO INCORPORATED TO TRIBE'S PETITION FOR INTERLOCUTORY REVIEW OF THE GRANT OF PARTIAL SUMMARY JUDGMENT BY THE SUPERIOR COURT IN W1-206

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* * *

[9] The water rights of the Apache Tribe should not be decided by implication. Phelps Dodge's observation does nothing to explain why it was not plain error for the Superior Court to base its ruling in Apache Tribe's Case (W1-206), on findings of fact and conclusions of law made in GRIC's case (W1-203). The Apache Tribe is culturally and legally distinct. The Apache Reservation is geographically distinct from the GRIC Reservation. W1-206 arises from clearly different factual and legal circumstances,

and the Tribe has presented entirely different defenses to the application of *res judicata*.[7]

* * *

[7] While the Apache Reservation comprises almost 2 million acres, with many thousands of acres located on the Gila River, the United States only received 6,000 acre-feet of water per year for the irrigation of 1,000 acres of land under the Globe Equity Decree with an 1846 priority date, with no storage rights in the San Carlos Reservoir. The water can be used for no other purpose but irrigation. This amount of water represents less than a fraction of the water needed by the Apache Tribe for irrigation purposes on the Reservation. In contrast, the United States secured 210,000 acre-feet of water per year for GRIC with an "immemorial" priority date for surface flow of the Gila River, along with 1.2 million acre-feet of storage water rights in the San Carlos Reservoir as part of the San Carlos Project, half of which benefits GRIC. However, Phelps Dodge is incorrect with its argument that the Apache Tribe has attempted to upset the application of *res judicata* based upon "purely equitable" grounds. *See* Phelps Dodge Response at 8. The Order in W1-206 violates Constitutional due process concerning valuable property rights. Nevertheless, this *is* a case in equity, and the gross inequities visited upon the Apache Tribe under the Globe Equity Decree do provide compelling evidence of the inadequate representation of the Apache Tribe by the United States in the Globe Equity proceedings.

IN THE SUPREME COURT
OF THE STATE OF ARIZONA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.

Supreme Court
No. WC-02-0003-IR

Maricopa County
Nos. W-1, W-2, W-3, W-4
(Consolidated)

[Contested Case No. W1-206]

[April 16, 2004]

MOTION FOR ORAL ARGUMENT TO GRANT OR DENY THE SAN CARLOS APACHE TRIBE'S PETITION FOR INTERLOCUTORY REVIEW AND FOR A RULING

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* * *

[3] There are ample reasons to grant the Apache Petition on its unique facts and allegations, none of which were raised by the other Petitions or Cross-Petitions.[2]

* * *

[11] The resolution of these material and unique issues for the Apache Tribe is critical. Time is of the essence. Ever increasing withdrawals of the waters of the Gila River upstream from the Apache Reservation, which would be exacerbated by the Settlement Act, have reached

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[2] The United States' Response in Support of the San Carlos Apache Tribe's Petition for Interlocutory Review dated December 23, 2002 ("U.S. Response"), at p. 11, agreed that the Apache Tribe's claims are unique, and argued these unique claims should be accepted by the Court separately for the limited purpose of reversing the Superior Court, and remanding these issues for further consideration and resolution.

such comprehensive proportions so as to consistently deprive the Tribe of its meager right to 12.5 cfs under Globe Equity, which is the most senior right (1846) above Coolidge Dam.

The grounds for deciding whether to grant or deny an interlocutory petition for review under Paragraphs B.2., B.3., and B.4., of the Special Procedural Order, are all demonstrated by the Apache Petition. The Superior Court has ruled upon an important question of law that should be decided by the Court before further proceedings. Early Appellate review would save substantial time, expense, and there can be no doubt that "the interests of justice otherwise require early appellate review." The Apache Petition on the merits would resolve these unique issues, reduce the on going related damages to the Tribe, and encourage mitigation as early as possible. The interests of justice for the Apache Tribe, and the public interest are best served by an immediate decision by this Court to grant or deny the Apache Tribe's Petition.

* * *

WC-02-0003-IR

In the

Supreme Court

of the

State of Arizona

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated)
[Contested Case No. W1-206]

[April 25, 2005]

OPENING BRIEF ON THE MERITS

* * *

[30] The water right for the Apache Reservation set forth in the *Decree* is what it is, no more and no less, based on its definition within the terms of the *Decree*. As such, the right most closely resembles a right that would be described under the state doctrine of prior appropriation, although the right is a federal right subject to federal law, and enforceable under the exclusive jurisdiction of a federal court.[86]

As to the Tribe, the *Decree* can mean nothing more. It must be construed within its four corners. Its terms exceed

[86] SOF#220.

the authority of the federal court that entered it. With no findings of fact or conclusions of law to support the *Decree*, in contravention of the Federal Rules of Equity applied to such decrees at the time, it can mean no more nor less than the words contained within its four corners. Thus, but for 1,000 acres of land along the Gila River, the Tribal water rights for the Apache have not been adjudicated.

* * *

[31] While the question regarding the preclusiveness of the *Decree*, as presented [sic] Contested Cases W1-203 and W1-206, was identical, its answer called for (1) a **separate** examination of the unique factual history involving these two very different Indian Tribes, as well as the vastly disproportionate water rights obtained for their respective Reservations under the *Decree*; and (2) separate consideration of the different legal arguments made by the Tribe and GRIC on summary judgment, and two distinctly different legal relationships with the United States.

By adopting its findings and conclusions made for GRIC in W1-203 as the basis for its ruling on the Tribe's water rights claims in W1-206, the Superior [32] Court ignored the historical, factual and legal differences between the Tribe and GRIC, and failed to consider or otherwise rule on the different legal arguments and defenses expressly made by the Tribe in W1-206. This was reversible error.

* * *

[33] The Superior Court's failure to consider the unique factual history of the Tribe and its Reservation and related legal arguments, deprived the Tribe of any [34] opportunity to present its case and to have its arguments

considered in a meaningful way. This was clear error. The Tribe is entitled to its day in court.

* * *

[70] Similarly, in this case, the Secretary was not empowered to represent the Tribe in *Globe Equity,* or to otherwise convey or extinguish its Tribal water rights in the *Decree.* The Court should rule as a matter of law that the Secretary was not authorized to represent the Tribe or to extinguish these Tribal water rights to the Gila River mainstem by stipulating to the entry of the *Decree*, **and** that there was a lack of privity between the United States and the Tribe which precludes the [71] application of res judicata to the Tribe's water rights claims in this case.[154]

* * *

The Superior Court granted partial summary judgment against GRIC and the United States on behalf of GRIC in W1-203, in favor of the Apache Tribe, ruling that "[i]n this adjudication, neither GRIC nor the United States on behalf of GRIC shall be entitled to claim water rights relating to the mainstem of the Gila River, **including flow from the San Carlos River**, except to the extent such rights were granted to them by the *Globe Equity Decree.*" Amended Order at 25 (emphasis added). In issuing this ruling, the Superior Court failed to provide any rationale or discussion regarding this conclusion. The

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[154] Since there was a lack of privity between the United States and the Tribe in *Globe Equity,* it follows as a matter of law that there is also a lack of **adversity** between the Tribe and the other parties to the *Decree*, which also bars the application of res judicata. Claims cannot be barred where there is no adversary relationship. *See Restatement (Second) of Judgments* § 38 (1982).

Superior Court did, however, observe that its ruling was **not** based upon any "consideration" of the Tribe's argument that the *Landowners' Agreement of 1924* specifically precluded GRIC, and the United States on behalf of GRIC, as well as SCIDD, from claiming any water rights to the San Carlos River. *Id.*

[72] Although the Tribe agrees with the Superior Court's ruling on the San Carlos River in W1-203, its failure to provide any basis for this ruling, coupled with its failure to consider or rule as a matter of law on the Tribe's argument regarding the preclusive effect of the *Landowners' Agreement of 1924*, was clear error and injects unnecessary uncertainty into this Adjudication. Given the confusion created by the Superior Court's ruling, the Tribe requests this Court to clarify the impact of the *Landowners' Agreement of 1924* here, and to rule as a matter of law that *the Landowners' Agreement of 1924*, as required by the 1924 Act, and as incorporated into the *Decree*, bars GRIC, and the United States on behalf of GRIC, from claiming any water rights to the San Carlos River in the Adjudication, pursuant to federal law, and under the doctrine of res judicata.[155]

* * *

[155] The *Landowners' Agreement of 1924* also bars SCIDD from claiming rights to the San Carlos River.

WC-02-0003-IR

In the

Supreme Court

of the

State of Arizona

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated)
[Contested Case No. W1-206]

[August 12, 2005]

REPLY BRIEF

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* * *

[11] The Superior Court could not have considered the unique facts and related legal arguments made by the Tribe in W1-206 where it simply adopted a previous decision from an entirely different contested case – a case which involved vastly different material facts, and which contained different legal arguments and defenses to res judicata.

* * *

[14] The defense of inadequate representation was not raised by GRIC in W1-203, and even assuming *arguendo* that it had been, the Superior Court could not have resolved this issue for the Tribe in W1-206 by merely

incorporating its findings and conclusions made for GRIC in W1-203, because the underlying facts which support the Tribe's inadequate representation claim are materially different from the facts which might support a similar claim by GRIC.[26]

* * *

[26] *See* Tribe's April 25, 2005, Opening Brief on the Merits ("Opening Brief") at 48-51.

WC-02-0003-IR

In the

Supreme Court

of the

State of Arizona

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE

Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated)
[Contested Case No. W1-206]

[September 2, 2005]

SURREPLY BRIEF

* * *

[5] In the end, the parties agreed upon a unique and unprecedented contract, [6] called the *Globe Equity Decree.*

* * *

[12] Given the unique characteristics of the United States' right for the Reservation (for lands off the Reservation and subject to sale), the *Decree* demonstrates that the "real" rights of the Tribe could not be so "inextricably linked" with the resulting right in the *Decree*, as to justify a finding of a waiver of sovereign immunity by the United States in *Globe Equity* for the Tribe on the mainstem of the Gila River. *See McClendon v. United States*, 885 F.2d 627, 631 & n.1 (holding that tribe's

initiation of action concerning ownership of disputed land did not constitute waiver of the tribe's sovereign immunity as to lessees action to enforce terms of lease and where the tribe did not manifest requisite unequivocal consent to suit).[29]

* * *

[29] *See also* Tribe's Reply at 69-79 (discussing lack of Congressional authority at Issue 4); *Utah Power & Light Co. v. United States*, 243 U.S. at 389, 404 (1916) (observing that the power of Congress is exclusive and that only through its exercise in some form can rights in lands belonging to United States be acquired).

IN THE SUPREME COURT OF THE STATE OF ARIZONA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE.

Supreme Court No. WC-02-0003-IR

Maricopa County Nos. W-1, W-2, W-3, W-4 (Consolidated)

[Contested Case No. W1-206]

[February 24, 2006]

THE SAN CARLOS APACHE TRIBE'S MOTION FOR RECONSIDERATION

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* * *

[13] Thus, even if principles of comity were to require the Court to honor the rulings of the *Globe Equity* court, the Court should not have properly based its decision upon the *Globe Equity* court's 1983 Order which is in reference to another Indian Tribe (GRIC).[12] The Tribe was not a party in the *Globe Equity* litigation until 1990. The 1983 Order was directed towards GRIC, not the Tribe, and GRIC had significantly different factual circumstances and arguments which predicated the Court's 1983 Order. Moreover, the 1983 Order did not rule regarding the preclusive effect of the *Decree* as to the Tribe **or** as to GRIC.

* * *

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[12] Decision at 46-49.

SUPREME COURT OF ARIZONA

IN RE: THE GENERAL ADJUDICATION OF ALL RIGHTS TO USE WATER IN THE GILA RIVER SYSTEM AND SOURCE	Arizona Supreme Court No. WC-02-0003-IR Maricopa County Superior Court Nos. W-1, W-2, W-3, W-4 (Consolidated) [Contested Case No. W1-206] [March 17, 2006]

ASARCO LLC'S RESPONSE TO THE SAN CARLOS APACHE TRIBE'S MOTION FOR RECONSIDERATION

* * *

[9] Counsel for the Tribe made clear in his rebuttal oral argument that the Tribe wants to retain the right to 6,000 acre feet per annum recognized in the Globe Equity Decree, while being free to assert additional claims to the mainstem of the Gila River due to alleged inadequate representation:

> Mr. Sparks: [25:21][3]
>
> We're not asking to overturn Globe Equity 59.
>
> Mr. Sparks: [26:13]
>
> I don't think this court can find any other thing from the decree except what the parties agreed to

[3] Time references are to the time elapsed on Tape 2, Side A of the recording of oral argument in this appeal. The recording was obtained from the Clerk of the Supreme Court.

strictly within the box. And that has to be narrowly construed for res judicata.

[10] Justice Berch: [28:09]

Mr. Sparks, all of these arguments, though, the conflict of interest, the fact that relative to other users the San Carlos Apaches didn't get much water. All of that seems to go to adequacy of representation, and you started off with the claim that there was a due process violation as a result of this inadequacy of representation. Yet you started off your presentation on rebuttal saying "I'm not asking you to overturn the GE 59 Decree."

Mr. Sparks: [28:40]

That's correct. We're not. We're asking to adjudicate those rights that were not adjudicated by the decree. It doesn't overturn the decree at all.

Justice Berch: [28:49]

But aren't you claiming that none of the San Carlos Apache Tribe's water rights were adjudicated fairly in the GE 59 settlement?

Mr. Sparks: [28:56]

No. They weren't adjudicated at all. It had 8,600 acres of land that it had historically farmed. It didn't get any water rights for that.

Chief Justice McGregor: [29:06]

But if you're correct that none of those rights were adjudicated at all, then the inadequacy of representation doesn't come into play, does it? If we agree with you that the decree should be read very narrowly to only affect these very limited rights, then inadequacy of representation or not, that's a second position, or fallback position, is it?

Mr. Sparks: [29:32]

Well, the conflict of interest is straight out front. They had one, and *Nevada* didn't say that an actual conflict of interest was okay for the United States.

Chief Justice McGregor: [29:42]

But doesn't that matter only if it means that the decree is not valid?

Mr. Sparks: [29:46]

No. That matters because if there was no privity, the United States could not bind the Tribe. If it had, if it actually had a conflict [11] of interest, it couldn't bind the Tribe. Morton, the attorney for the United States, represents the San Carlos Irrigation District.

Chief Justice McGregor: [30:05]

Well, if that's correct, then the San Carlos aren't bound by anything in the decree, are they? Not even that narrow interpretation you're asking us to give?

Mr. Sparks: [30:13]

The narrow interpretation is that the Tribe is bound because of the United States – for the 1,000 acres of water right that it actually got.

Chief Justice McGregor: [30:21]

So as far as that goes, they're bound?

Mr. Sparks: [30:23]

Yes, ma'am.

Chief Justice McGregor: [30:23]

Okay.

Mr. Sparks: [30:24]

And we're not asking to overturn the decree. . . .

* * *